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No. 80-366

IN THE

Supreme Court of the United States

October Term, 1980

GREAT LAKES INTERNATIONAL, INC.,
Petitioner,

—against—

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, *et al.*,
Respondents.

BRIEF FOR PRIVATE RESPONDENTS IN OPPOSITION

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October 6, 1980

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QUESTIONS PRESENTED

1. Whether plaintiff's interest in foreclosing competition from a vessel whose construction may be assisted by a Government loan guarantee is arguably within the zone of interests to be protected by the statute in question (Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280)?

The district court and a unanimous panel of the court of appeals answered that question in the negative, held that plaintiff lacks standing to bring this suit, and granted defendants' motions for summary judgment dismissing the complaint.

For the reasons stated in this opposition brief, that decision was correct and does not warrant review by this Court. If, however, a writ of certiorari were to be granted, defendants would urge affirmance on the additional grounds of their motion that raise the following questions, none of which was reached on the merits by the courts below*:

2. Has plaintiff shown "specific facts" to establish a triable issue regarding the justiciability of the claim and plaintiff's standing to bring it, given:

(a) the numerous speculative contingencies that would have to eventuate during the next two years (many of which are under the control of non-parties, governmental and private) before the theorized threatened "injury in fact" could conceivably occur;

(b) the directive of 33 U.S.C. § 622 that the Federal dredger fleet be withdrawn from the market *pro tanto* with the entry of private dredgers such as that involved in this suit; and

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* For the purpose of deciding that plaintiff failed to meet the zone test (question 1), the district court assumed *arguendo* that "injury in fact" could be established.

(c) the lack of any reasonable basis for predicting that the injunction plaintiff seeks will redress the putative loss that plaintiff theorizes?

3. Can plaintiff establish subject matter jurisdiction, given the provisions of 46 U.S.C. § 1273(e) that the challenged agency action is "conclusive" and "incontestable"?

4. Is plaintiff's claim that the Government defendants acted illegally or irrationally based on "specific facts" or on unsubstantiated, inherently implausible or otherwise impermissible speculation?

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BRIEF FOR PRIVATE RESPONDENTS IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280, and the Rivers and Harbors Improvements Act of 1978, 33 U.S.C. §§ 622, 624, both of which are set forth verbatim in the appendix to the petition for certiorari here opposed.

Also involved are the following regulations contained in 46 C.F.R. Part 298, the pertinent subdivisions of which are set forth verbatim in the appendix hereto: §§ 298.1, 298.2, 298.10, 298.11, 298.12, 298.14, 298.32, 298.43.

STATEMENT OF THE CASE

Plaintiff, Great Lakes International, Inc. ("Great Lakes"), petitions from the unanimous order of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, dismissing the complaint for lack of standing.

The suit is for an injunction to stop the Government from honoring its commitment to guarantee bonds pursuant to Title XI of the Merchant Marine Act of 1936 (46 U.S.C. §§ 1271-1280) in aid of the construction of a hopper dredger (a vessel used for the dredging of rivers and harbors).

Plaintiff is a stranger to that transaction but has itself received Title XI guarantees on $26.8 million of bonds for the construction of three dredgers. Two of those, which plaintiff owns in a joint venture with a Dutch company, are the only privately owned hopper dredgers currently operating in U.S. waters. 250a-51a.[1]

Plaintiff seeks to deprive the private defendants[2] of similar assistance. Its claim is that the Maritime Administration ("Marad"), if it eventually guarantees the bonds, will somehow approve, or fail to detect, agreements that will confer impermissible control over the operation of the dredger on a Dutch company, RBKW, and its domestic subsidiary, Stuyvesant.

[1] Numerical citations followed by the letter "a" are to pages of the joint appendix filed in plaintiff's appeal to the court of appeals. Citations to Great Lakes' Petition for a Writ of Certiorari appear as "Pet." followed by a page number.

[2] Private defendants, respondents herein, are: Jackman & Company ("Jackman"), David H. Jackman (deceased August 29, 1980), National Dredging, Inc. ("National"), Royal Boskalis Westminster N.V. (formerly Royal Bos Kalis Westminster Group N.V.) ("RBKW"), Stuyvesant Dredging, Inc. ("Stuyvesant"), United States Corporation Company ("USCC"), United States Trust Company of New York ("USTC"), Warburg Paribas Becker Incorporated and Williams-McWilliams Co., Inc. ("Williams-McWilliams").

A. Summary of Facts

Title XI embodies a program under which the Government guarantees bonds for the construction of dredgers as well as other U.S.-flag ships (46 U.S.C. §§ 1271(b), (c), 1273(a)). The private defendants and others are in the process of attempting to put together a transaction for the financing, chartering[3] and operation of a dredger that will qualify for this program. *See, e.g.*, 155a-61a; 231a-33a.

On November 5, 1979, based, as is customary, on an outline of the proposed transaction, Marad issued a Letter Commitment under Title XI to guarantee bonds for the construction of this dredger—up to $30,579,000 (127a-29a) (the total cost of construction will exceed $50 million, so that the prospective beneficial owner of the dredger will invest the additional $20-plus million required, 156a, 158a, 232a-33a).

That Letter Commitment is subject to various conditions: *e.g.*, that the final documentation (the financing, chartering and management agreements) be in form and substance satisfactory to Marad (127a-35a, 162a), and that all parties required to be U.S. citizens (the owner, operator and bareboat charterer) remain so (133a). The proposed time charterer, Stuyvesant, is not required to be a U.S. citizen, because the maritime laws expressly authorize non-U.S. citizens to time charter U.S.-flag ships with Marad's approval (46 U.S.C. §§ 808, 839), and nothing in Title XI prohibits loan guarantees to trans-

[3] Charters are of two principal kinds, bareboat (or demise) charters and time charters. In *Guzman v. Pichirilo*, 369 U.S. 698, 699-700 (1962) this Court described the difference as follows:

> "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee. . . . It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all."

See also 165a-66a, 233a-34a.

actions involving a non-U.S. time charterer (46 C.F.R. § 298.10(a); 234a). In fact, Marad frequently approves time charters to noncitizens for vessels financed under Title XI.

Under Marad practice, after the parties have reached agreement on the final documentation, Marad will determine whether those papers satisfy the conditions of the Letter Commitment (241a). If it determines they do, it will issue another commitment in printed form, which is also subject to many conditions, including that of the continued U.S. citizenship of parties required to be U.S. citizens as well as most of the other conditions set forth in the Letter Commitment (except, of course, those relating to the content of the final documentation which, by this time, will have been prepared and approved) (*see* 164a-65a, 171a *et seq.*). The parties and Marad will then execute the final documentation; Marad will actually guarantee the bonds; and the bonds will be offered for sale with that guarantee (*see* 241a).

In reliance on the November 1979 Letter Commitment, and with Marad's knowledge that they would so rely, the parties, including the prospective owner, operator, builder and time charterer of the dredger, materially changed their positions by executing various agreements, including a construction contract with Avondale Shipyards, binding themselves to proceed with the project (207a, 215a, 234a-35a, 242a-43a). As a result, major construction work is ongoing, with Avondale committed for millions of dollars worth of supplies, parts and equipment (215a).

The dredger will be constructed entirely in a U.S. shipyard (Avondale) and will be a U.S.-flag ship (167a, 214a, 234a-35a). Its beneficial owner will be BameriLease Capital Corporation ("BameriLease"), a subsidiary of Bank of America National Trust and Savings Association ("B of A") (157a). Legal title to the dredger will be placed in a U.S. trust company, as Owner Trustee, which is

the Title XI applicant and owner-obligor (157a, 161a, 231a & n., 232a-33a).[4]

The bareboat charterer of the dredger will be National, a special purpose corporation formed by USCC through its nominee partnership, Jackman (161a, 201a).[5] Under the management agreement, however, National will delegate the entire operational control of the dredger to Williams-McWilliams (161a, 202a, 210a-11a), an indirectly wholly owned subsidiary of Zapata Corporation (209a-10a). Williams-McWilliams will, accordingly, operate the vessel and furnish its master and crew (all of whom will be American seamen) (158a-59a, 210a-11a).

Williams-McWilliams could have become the bareboat charterer of the vessel rather than the bareboat charterer's managing agent, but this was unacceptable to Zapata (160a, 210a). For in that event, the bareboat charter hire payable to the Owner Trustee (more than $50 million) might have to be capitalized as a liability on Zapata's consolidated balance sheet, especially since Stuyvesant negotiated an option to cancel the time charter at any time (so as to preclude the possibility that the time charter hire might have to be capitalized on RBKW's consolidated balance sheet) (159a-60a, 210a). This was the reason for the retention of USCC to establish and

[4] The trust company which Marad approved as obligor was the United States Trust Company. Recently that company had to withdraw from the transaction for reasons unrelated to this suit, and, with Marad approval, Hartford National Bank and Trust Company has replaced it.

[5] USCC is engaged in the business of performing a variety of corporate services including, as a part of its normal service business, the establishment and maintenance of special purpose corporations (199a-200a). As explained in the affidavit of David H. Jackman, limitation of the "liabilities and balance sheet exposure of the participants" in business ventures is "often essential to the[ir] fruition"; and the business community is aware that the use of a special purpose corporation has this effect (200a).

To facilitate corporate formalities, the stock in the special purpose corporations established by USCC is routinely held (as is National's) by USCC's nominee partnership, Jackman, whose partners (all U.S. citizens) are officers of USCC (201a-02a).

maintain a special purpose corporation, National, as bareboat charterer (160a-61a, 200a-01a; *see* 210a).

There is no dispute in this case regarding the U.S. citizenship of B of A, BameriLease, the Owner Trustee, Williams-McWilliams or Zapata. There is also no dispute that USCC, Jackman and National are U.S. citizens; what plaintiff questions is whether National is somehow controlled by RBKW or Stuyvesant.

Plaintiff has asserted in conclusory form (in its complaint and affidavits below, and now its petition) that RBKW is an "undisclosed principal" of USCC, that RBKW "caused" National to be created, that "the various agreements" pertinent to this transaction will confer a bareboat, not a time, charter on Stuyvesant, and by that means will vest "exclusive control" of this dredger in RBKW (Pet. 4, 5).

Defendants, however, moved for summary judgment with affidavits both denying the existence of any such agreement, understanding or relationship (166a, 202a-03a), and demonstrating the extreme implausibility (indeed, the self-defeating nature) of any such arrangement (*see* pp. 25-26 *infra*)—and there is nothing in plaintiff's affidavits to contradict that showing.[6]

Moreover, if the time charter finally executed is not a true time charter, in the sense of giving impermissible rights of control of the dredger to Stuyvesant, it will not meet the objective criteria imposed by the Letter Commitment, and the Title XI guarantee will not be issued unless and until the time charter is made to meet such criteria.

B. The Decisions Below

The district court held that the interest plaintiff sought to prosecute in this suit—the insulation of itself from possible future competition from this dredger—was not within the zone of interests to be protected by the

[6] Plaintiff, afforded the opportunity for discovery on this issue, collected documents from and deposed an officer of USCC.

statute in question, even assuming, *arguendo*, all plaintiff's conclusory assertions to be true:

> "The objective of Title XI . . . is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards. The citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war . . . .
>
> "There is no suggestion in Title XI that Congress intended to give one subsidized shipowner, such as plaintiff, any voice in deciding what its competition should be." Pet. 6a.

The court of appeals summarily and unanimously affirmed:

> "Great Lakes' interest in restricting competition is not an interest covered by Title XI. Great Lakes therefore has no standing to bring this action." Pet. 3a.[7]

ARGUMENT

POINT I

THE DECISIONS BELOW TO DISMISS FOR LACK OF STANDING ARE PLAINLY CORRECT, FULLY COMPORT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, AND PRESENT NO REASON FOR THE GRANT OF CERTIORARI.

Both the district court and a unanimous panel of the court of appeals have held that Title XI has nothing

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[7] Thus, contrary to plaintiff's assertion, the decisions of the district court and court of appeals below were perfectly consistent—in method as well as outcome. Both courts decided that Title XI, the statute plaintiff claims was violated, was the statute whose purpose should determine the relevant zone of interest (Pet. 2a-3a, 5a-6a). Each court then decided that plaintiff's interest in restricting competition was not an interest germane to Title XI (*id.*). The only difference between the opinions of the two lower courts was that the district court more fully elaborated the reasons for its conclusion.

whatever to do with, let alone seeks to protect, plaintiff's interests in avoiding any future competition from the BameriLease dredger. Hence, the courts below correctly concluded that such interests are *not* "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

There is nothing in that conclusion meriting, much less requiring, review by this Court. It represents a commonplace application of a prudential limitation on standing established by this Court, and, indeed, well illustrates the soundness of that limitation.

A. The Correctness of the Decisions Below

1. Title XI of the Merchant Marine Act of 1936 is a Government assistance program that is entirely between the Government and the recipient of the grant. As stated in the House report:

> "The purpose of this bill is to encourage the use of private capital in the financing of ship construction." H.R. Rep. No. 1042, 83d Cong., 1st Sess. 1 (1953).[8]

[8] Plaintiff criticizes the court of appeals purportedly for relying "exclusively" on the above Report which, according to plaintiff, accompanied a mere "procedural" amendment to Title XI (Pet. 15 & n.).

In reality, the 1953-54 amendments completely transformed Title XI—*see, e.g.*, H.R. Rep. No. 2450, 83d Cong., 2d Sess. 1-2 (1954):

> "By reason of the inherent uncertainties in the business of operating ships, private capital has been reluctant to undertake to any appreciable extent the risks of lending money secured by ship mortgages. Such private financing is desirable not only because it will take the Government out of the business of lending money but also because it will tend to enlist the aid of the banking business in the problems of the American merchant marine. However, title XI of the Merchant Marine Act, 1936, as originally enacted, was limited in scope and did not prove effective. In an attempt to broaden the field to encourage private financing, the committee in 1953 reported the bill that subsequently became Public Law 288. This provided for a guaranty by the Secretary of Commerce of up to 90 percent of the amount of a ship mortgage but certain of its provisions, particularly those with reference to foreclosure on

When the Government decides that its purpose will be achieved by the grant of such a loan guarantee, or the commitment to do so, no one else's pocketbook is affected in the slightest. And no one else is intended to be protected, because there is nothing they need protection from.

For example, the grant of a loan guarantee in the present transaction will take nothing away from plaintiff. Plaintiff has already received more than $26 million in loan guarantees under the Title XI program, and could

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default, proved to be unworkable. This bill is the result of the committee's effort to overcome the shortcomings revealed by experience in Public Law 288 [67 Stat. 626 (1953)]."

Accord, S. Rep. No. 1804, 83d Cong., 2d Sess. 4 (1954) ("It would seem in keeping with uniform congressional intent that Title XI now, finally, be made to do the job for which it was designed.").

Plaintiff further suggests that the House Committee Report statement, quoted above in text, "conflicts with the enacting clause" of the 1938 amendment by which Title XI was added to the Merchant Marine Act of 1936 (Pub. L. No. 75-705, 52 Stat. 953 (1938)) (Pet. 15 n.). But Pub. L. No. 75-705, of which Title XI was a small and then fledgling part, stated simply, in its enacting clause, that its purpose was "to amend the Merchant Marine Act, 1936, to further promote the merchant marine policy therein declared [at 46 U.S.C. §1101, discussed pp. 13-14 *infra*], and for other purposes". The statement of the House Committee Report quoted above in text, as well as numerous subsequent congressional reports to the same effect regarding the specific purposes of Title XI, are perfectly compatible with that enacting clause (which is, indeed, of almost meaningless generality). *See, e.g., Hearings on H. R. 8637 Before the House Comm. on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. 24-25, 47-48, 51, 59, 78, 118, 121-22 (1954) ("This is not particularly a shipper's bill so much as it is an investor's bill, to interest investors and banking people in financing the American merchant marine . . .", *id.* at 24); H. R. Rep. No. 2450, 83d Cong., 2d Sess. 1-3 (1954); 100 Cong. Rec. 4042-43 (1954) (Statement of Sen. Butler); S. Rep. No. 2632, 84th Cong., 2d Sess. esp. at 1, 4 (1956) (reporting on a bill "to facilitate private financing of merchant vessels in the interest of national defense"); H. R. Rep. No. 1953, 85th Cong., 2d Sess. (1958); H. R. Rep. No. 688, 92d Cong., 1st Sess. 2, 14 (1971); S. Rep. No. 1137, 92d Cong., 2d Sess. 1-2 (1972).

It should also be noted that the court of appeals had before it all aspects of legislative history that were even arguably pertinent to this matter, presented by both sides.

obtain as many additional grants as it could justify to Marad, irrespective of the grant involved in this case.

2. Numerous cases stand squarely for the proposition that the competitive interests of competitors of parties benefited by governmental assistance programs are not within the zone of interests sought to be protected by such programs—*e.g.*, *Rodeway Inns of America, Inc. v. Frank*, 541 F.2d 759, 765-66 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) (holding that various hotel owners had no standing to challenge the conversion of a HUD-financed apartment building into a prospectively competing hotel because the National Housing Act was designed to promote construction, not to protect competitors); *Hood River County v. United States Dep't of Labor*, 532 F.2d 1236, 1238 (9th Cir. 1976) (per curiam) (holding that plaintiff organizations had no standing to challenge the Department of Labor's grant to a competitor because, *inter alia*, the program involved was aimed at aiding the migrant workers ministered to by the complaining organizations, not the organizations which received the grants).[9]

[9] *See also Clinton Community Hospital Corp. v. Southern Md. Medical Center*, 510 F.2d 1037 (4th Cir.) (per curiam), *cert. denied*, 422 U.S. 1048 (1975) (holding that plaintiff hospital had no standing under the Federal environmental laws to challenge the construction of a competing hospital pursuant to a grant of feasibility from HEW to obtain financing from HUD); *Rural Electrification Administration v. Central Louisiana Electric Co., Inc.*, 354 F.2d 859, 865 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966) (holding that a competitor electric utility lacked standing to enjoin a loan by the Rural Electrification Administration to an electric cooperative for construction of facilities); *Barry v. Housing and Home Finance Agency*, 340 F.2d 939, 940 (2d Cir. 1965) (per curiam) (holding that competitor hotel owners lacked standing under the Federal Housing Act, 42 U.S.C. § 1456(g), to enjoin an urban redevelopment project including transient housing units because there was "no indication either in the language of [§ 1456(g)] or in the legislative history of any . . . intent" to confer standing); *Window Systems, Inc. v. Manchester Memorial Hospital*, 424 F. Supp. 331, 336-38 (D. Conn. 1976) (holding that an unsuccessful bidder was outside the zone of interests protected by the Hill-Burton Act, 42 U.S.C. § 291, which was directed toward the construction, modernization and improvement of hospitals to upgrade medical services available to all people).

Below, plaintiff attempted to distinguish those cases on the ground that they did not involve statutes like Title XI, which hinges Government assistance on a citizenship requirement. But that is hardly a distinguishing ground.

All Government assistance programs hinge assistance on applicants' meeting specified qualifications (whether citizenship, as in Title XI, or other qualifying tests). Thus, all cases cited above involved the complaints of competitors of applicants that the applicants had not satisfied the statutory criteria and were therefore being unduly favored over the competitors who allegedly had. The consistent ruling of those cases has been that the objectives of the qualifying criteria in a Government assistance program are to further *public* interests—not the self-interests of the recipient's competitors.

So here.

3. It is therefore not surprising that there is absolutely nothing in the language of Title XI or its legislative history (*see, e.g.*, history cited note 8 *supra* and note 19 *infra*) that indicates the slightest concern with entrenching the competitive positions of shipowners such as plaintiff—and there is not the slightest reason for that statute to protect any such position.

On the contrary: Congress made Title XI guarantees and commitments to guarantee "conclusive" and "incontestable" (46 U.S.C. §1273(e)). If Congress intended to allow plaintiff and similarly situated claimants to prosecute their interests against competition by challenging Title XI grants, it is hardly likely that Congress would have removed those grants from private litigation by enacting that "incontestability" provision.

4. Disregarding these clear statutory indications, plaintiff claims that *all* citizenship requirements of *all* provisions of the Jones Act, the Merchant Marine Act of 1936 and other maritime statutes must be construed as evidencing Congressional intent to insulate plaintiff (and other domestic operators) from foreign competition. This

conclusion is arrived at by reading the specific purposes of several citizenship requirements of the Jones Act into the preamble of the Jones Act (46 U.S.C. § 861, which simply declares that the United States, for general purposes of defense and commerce, shall have a merchant marine owned and operated by citizens of the U.S.); from there, into the preamble to the 1936 Act (46 U.S.C. § 1101, which states the same general objective); and from there into all citizenship requirements of all titles of the 1936 Act and others.

There are three basic reasons why this process of statutory construction is an untenable "house of cards."[10]

First, the very fact that the Jones Act, enacted in 1920, had already prohibited all foreign-owned and foreign-controlled ships from engaging in the coastwise trade (46 U.S.C. § 883), made it entirely unnecessary for Congress to attempt to serve any such purpose by the enactment, eighteen years later, of Title XI.

Second, in the few instances in which Congress has intended to protect U.S. coastwise operators from competition of any sort—primarily where they would otherwise face unfair competition from more cheaply built and operated foreign ships (§ 27 of the Jones Act, 46 U.S.C. § 883) or from U.S. ships originally subsidized for the foreign trade (Titles V and VI of the 1936 Act)—there is both an obvious need for so doing and an unambiguous expression of that intent. *See also* 46 U.S.C. §§ 1158, 1171(a), 1172, 1173(b), 1174, 1175(c), 1222, 1223(a); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 574-75, 586-88 (1980) ("*Seatrain*") (holding that "[i]t was not the purpose of the [1936] Act to prohibit [the] entry" into the "domestic trade" of a vessel on an economic "footing equal to that of vessels already in that trade", *id.*

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[10] For a discussion of the fact that the citizenship requirements of different statutes often have different objectives, *see* Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961).

at 590); *Matson Navigation Co. v. Connor*, 258 F. Supp. 144, 149 (N.D. Cal. 1966), *aff'd per curiam*, 394 F.2d 514 (9th Cir.), *cert. denied*, 393 U.S. 998 (1968).

Here, there is neither.

Third, to import the *general* purposes of either the 1936 Act or the Jones Act into Title XI would no more assist petitioner's zone contentions than do the specific purposes of Title XI.

The fact that the 1936 Act's goals include, as petitioner stresses, encouraging the development of a merchant marine "owned and operated under the United States flag by citizens of the United States, insofar as may be practicable" (46 U.S.C. § 1101(c)), does not signify any desire to insulate such vessels from competition of any sort—but rather to ensure the American people adequate service and equitable rates, to guard against the interruption of shipping service during wartime, and, vitally, to make the fleet available for national defense. H.R. Rep. No. 2168, 75th Cong., 3d Sess. 3-6 (1938); *accord, e.g.*, H.R. Rep. No. 1277, 74th Cong., 1st Sess. 4-5, 8-9 (1935).[11]

This conclusion is confirmed by the original version of § 1101(c) which set forth the purpose manifested by the legislative history on the face of the statute itself:

> "(3) owned and so operated under the United States flag by citizens of the United States and so regulated by the Government *as to secure to the*

[11] Congress' chief concern was to avoid a repetition of the World War I situation in which the European nations withdrew their ships and seamen from the U.S. trade to act as naval and auxiliary units in the European war theatre. As a result, this country was left without bottoms for its imports and exports, without seamen sufficient to crew its few American-flag vessels, and without sailors and ships to call upon for its own wartime effort. *See, e.g.*, H.R. Doc. No. 118, 74th Cong., 1st Sess. 21 (1935); 80 Cong. Rec. 9899 (1936) (Remarks of Sen. Guffey); *id.* at 9906 (Speech of Sen. McAdoo); 80 Cong. Rec. 10572 (1936) (Remarks of Sen. Crawford); *id.* at 10575 (Remarks of Rep. Sirovich).

shipper and receiver of products in the domestic and foreign waterborne commerce of the United States adequate service and equitable rates. . . ." S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935) (emphasis added).

Moreover, there is no more indication in the general policy declarations of the Jones Act than there is in those of the Merchant Marine Act of 1936 of any Congressional objective of insulating plaintiff from competition of any kind—and, of course, far less basis for importing these provisions into an entirely different statute.[12]

Indeed, Section 29 of the second committee print of the Jones Act (forerunner of current 46 U.S.C. § 883, the key provision defining the eligibility requirements for vessels in the coastwise trade) did not even contain a citizenship requirement until the U.S. Shipping Board recommended it as "vital for the preservation of our maritime security". S. Rep. No. 573, 66th Cong., 2d Sess. 9 (1920). The Board's concern was that "[u]nless our coasting fleet be wholly and unequivocally owned by loyal United States citizens, it can not be rated a dependable unit in time of national emergency" (*id.* at 10), *not* that it would remove competitive risks.

B. Alleged Conflict with Decisions of This Court

1. Plaintiff cites *Seatrain, supra*, 444 U.S. 572 (1980), as a decision of this Court that "supports the position of petitioner" (Pet. 16). In fact, *Seatrain* had nothing to do with a citizenship eligibility requirement, but rather concerned a restriction (46 U.S.C. § 1156) against U.S. *citizen-owned* ships subsidized for the foreign trade coming into the coastwise trade and competing unfairly with unsubsidized vessels, 444 U.S. at 574, 588-90. Domestic companies potentially impacted by such unfair competition are obviously within the zone of interests sought to be protected by that restriction.

[12] *See also Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 295 & n.5 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964).

That, however, is not plaintiff's case.[13] Plaintiff cannot complain that it will suffer any competitive cost disadvantage as a consequence of the Marad action in this case; on the contrary, plaintiff is saying: don't grant a loan guarantee in this instance—and do take business away from American shipyards, do take jobs away from American workers, and do take a prospective U.S.-flag ship away from the American fleet—despite the fact that the dredger in question will derive no cost advantages whatever, *vis-a-vis* plaintiff, as a result of receiving that loan guarantee.

There is not a single provision of maritime law designed to further such interests—and certainly Title XI has no such objective.

2. Plaintiff further contends that the district court's finding regarding the purposes of Title XI conflicts with this Court's dictum in *Central Vermont Transportation Co. v. Durning*, 294 U.S. 33 (1935),[14] adverting to the purposes of 46 U.S.C. § 883. But that 1935 Jones Act decision could not have had anything to do with the purposes of other statutory programs enacted one year (the Merchant Marine Act of 1936) and three years (Title XI) later.

Thus, what plaintiff is really saying here—and the proposition to which all its contentions repeatedly come down—is that if plaintiff's interests are within the zone of interests of any citizenship provision of the Jones Act,

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[13] In fact, Bazelon, J., dissenting from the decision this Court reversed in *Seatrain*, made clear the distinction between the facts of that case and those of a case such as this:

> "Although the nation's merchant marine policy does shield domestic carriers from competition by foreign built vessels, as well as from unfair competition by subsidized vessels, it was not intended to limit the competition among American built, unsubsidized vessels." *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814, 843 n.16 (D.C. Cir. 1979) (Bazelon, J., dissenting), *rev'd sub nom. Seatrain, supra*, 444 U.S. 572 (1980).

[14] *Central Vermont* was an action by a non-citizen shipowner against a collector of customs to restrain the seizure of merchandise transported by the shipowner. 294 U.S. at 34-35.

they must be within the zone of all such provisions of the 1936 Act; and that is fallacious on its face.

C. Alleged Conflict Among Circuits

1. The plain fact is that no conflict exists among the circuits in the application of the zone test to cases such as this. On the one hand, as reviewed above (pp. 10-11 & n.9), many decisions have denied standing to competitors of the recipients of Government assistance programs; and, on the other hand, as plaintiff's counsel admitted at oral argument before the court of appeals, there appears to be no "standing case involving government subsidies in which someone has been able to in effect enjoin the granting of the subsidy" (colloquy between Judge Oakes and Mr. Norton, Tr. 10).

2. Plaintiff nevertheless purports to find a conflict among circuits in that

> "The District of Columbia Circuit has decided, at least with respect to the Internal Revenue Code, that only the specific section of the statute allegedly violated should be examined [*Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) ("*Tax Analysts*")], while most courts look to the statute as a whole, or to other statutes which were intended by Congress to be construed in harmony with the one allegedly violated." Pet. 13-14 (footnotes omitted).

But that is not a "conflict" among circuits; those decisions are perfectly consistent. All the District of Columbia Circuit stated in *Tax Analysts* is that litigants cannot

> " 'borrow' the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision *where that intent is not evident*, in order to satisfy the zone test. A contrary decision in this context would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent. . . ." *Id.* at 141 (emphasis added).

No decision of any court of appeals conflicts with that obviously logical proposition. On the other hand, nothing in *Tax Analysts* negates the proposition that other sections of the same statute, or other statutes, may be consulted in zone-test analyses if they can be shown to share an identity of purpose with the section allegedly being violated. (Rather, exactly that is indicated by the court's reference to the fact that the "Internal Revenue Code is an extraordinarily complex statute which does *not* have a single, unified purpose", *id.* (emphasis in original).)

Thus, when plaintiff argues here that the objectives of the citizenship requirements of certain restrictive provisions of the Jones Act must be examined to determine the purpose of the citizenship requirements of Title XI, plaintiff is arguing—and arguing erroneously—from the very conclusion that plaintiff is attempting to prove: that all those provisions have "a single, unified purpose".[15]

[15] One fact (among many others) clearly indicating the widely *diverse* purposes of the hundreds of provisions of maritime laws is that at least ten different government agencies or departments are authorized to administer and issue regulations for implementing those purposes—*viz.*, Marad, the Federal Maritime Commission, the U.S. Coast Guard, The National Shipping Authorities, the National Maritime Fisheries Service, the National Oceanic and Atmospheric Administration, the U.S. Customs Service, the Internal Revenue Service, the General Accounting Office, and the Department of State. *See, e.g.*, 46 C.F.R. § 529.1(a); 46 C.F.R. § 10.01-1(a); 50 C.F.R. § 251.3; 19 C.F.R. § 12.85; 26 C.F.R. Part 2; 4 C.F.R. § 52.2; 22 C.F.R. Part 82.

Moreover, the lower courts have found that this diversity of purpose results in conflicts. *See, e.g., American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1166 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979) (holding that the protective intent of § 27 of the Jones Act did not override the "quite separate" national policies of § 21 of the *same Act*); *Safir v. Gibson*, 417 F.2d 972, 976 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970) ("We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the general policy of the Act to build up the American merchant marine through subsidy payments and the direction of § 810 [46 U.S.C. § 1227] for withdrawal of those subsidies when they are used to hurt rather than help."); *Matson Navigation Co. v. Connor, supra*, 258 F. Supp. at 147, 153-54.

D. Alleged Need for This Court's Resolution of Issues

Plaintiff suggests that there is just something wrong (although plaintiff never states what) with the zone test itself so that certiorari should be granted to review that test, irrespective of whether it was properly applied to this case. In fact, however, the application of the test to this case demonstrates the soundness of this prudential limitation.

Were it not for this restriction on standing, the first business entity to avail itself of a Government assistance program in any line of commerce could substantially frustrate the grant of similar assistance to actual or possible competitors by bringing vexatious litigation and tying the program up in the courts interminably. That course of conduct would achieve not only the selfish objectives of the claimant but also an obstruction of the statutory goals.

And that is precisely what would happen as a result of this suit if plaintiff had standing to pursue it. As stated by Marad—the agency charged with the responsibility of administering and policing compliance with the Title XI program—

> "Frustration of the project after issuance of the Letter Commitment causes not only injury to the applicant but also harm to the Government. Not only does it waste time and resources, it damages the credibility of Marad's determinations necessary for approval of Title XI applications. This damage in turn gravely diminishes the faith in and reliance on the Letter Commitment of other applicants. The inescapable result will be that Marad's statutory goal—promotion of the Merchant Marine—is seriously threatened." 243a.

POINT II

FAR FROM SHOWING, AS PLAINTIFF ASSERTS, THAT IT WOULD PREVAIL IN THIS CASE IF ZONE RESTRICTIONS WERE LIFTED, THE RECORD DEMONSTRATES THAT PLAINTIFF'S CLAIMS ARE NEITHER JUSTICIABLE NOR SUPPORTED BY INJURY IN FACT, ARE PRECLUDED BY THE INCONTESTABILITY PROVISION OF TITLE XI, AND OTHERWISE FAIL TO RAISE GENUINE TRIABLE ISSUES.

A. Lack of Justiciability and Injury in Fact

1. The transaction plaintiff attacks is far too indefinite at this stage, and the injury plaintiff prophesizes is far too improbable and remote, to sustain Article III standing on either justiciability or injury-in-fact grounds.

For the purposes of disposing of this case on "zone of interests" grounds, the court below assumed future injury, *arguendo*, by postulating that, if Congress intended to protect plaintiff's present monopoly position, the future entry of any competing dredger would dislodge that monopoly and constitute "injury in fact" (Pet. 5a).[16]

But that *arguendo* assumption is plainly invalid (as the district court itself found in applying the zone test, Pet. 5a-6a); it is not, in any event, plaintiff's theory of injury (as plaintiff's counsel stated on oral argument, "plaintiff's contention is not that it doesn't want competition," Pet. 7a); and it would be conceptually unsound if it were.

Plaintiff, a business entity, cannot sustain future, cognizable injury unless and until it has suffered a loss of profits that would have been earned, but for the act

[16] Contrary to plaintiff's assertion (*see* Pet. 7-8), the district court did not "find" anything regarding injury in fact, and consequently no such "finding" was before the court of appeals (Pet. 5a; *see* Pet. 2a-3a).

complained of. Relinquishment of a monopoly position is irrelevant, if it will not result in such a loss. Moreover, the alleged "illegality" of prospective competition from the BameriLease dredger is equally irrelevant, if the entry of that dredger into plaintiff's market would in no way diminish plaintiff's profits. For plaintiff's claim of "injury in fact" to be substantiated, there must be a causal connection between the issuance of the Letter Commitment to defendants and an imminent, probable, tangible loss to plaintiff,[17] and plaintiff can establish none of these elements.

Several of the many contingencies precluding this claim are summarized briefly below.

2. The final documentation of the transaction in question has not yet been agreed upon by the parties and, of course, not yet approved by Marad. One party, the United States Trust Company, has already withdrawn from the transaction; a new company to perform the function of Owner Trustee has just been found; negotiations are now ongoing to replace the original time charterer by a partnership between Stuyvesant and a subsidiary of Williams-McWilliams; and other substitutions or realignments of parties are possible.

3. The dredger itself, though now under construction, will not be completed for almost two more years. At that time it must be approved by three separate Government agencies (the Coast Guard, regulating safety and engineering, *see, e.g.*, 46 C.F.R. subchapters E, F, I, J; the Federal Maritime Commission, implementing financial

[17] *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (and cases cited therein); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-08, 514-16 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Linda R. S. v. Richard D.*, 410 U.S. 614, 616-18 (1973); *American Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 148-50 & n.2 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1050-51 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978).

responsibility regulations for water pollution control, *see* 46 C.F.R. Part 542; and the FCC, regulating ownership and operation of radios, *see* 47 C.F.R. Part 83) and then undergo a new administrative proceeding in order to be registered and enrolled by the United States Coast Guard for the coastwise trade (*see* 46 U.S.C. §§ 19, 251-60, 292; 46 C.F.R. subchapter G). And while such a ruling would be two years closer to any putative loss to plaintiff, even an enrollment determination of that nature has been held too "speculative" a basis for injury in fact to permit the competitor standing to attack it. *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 297 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964).

4. Even after enrollment, it is virtually certain that this dredger will not take any business away from plaintiff that plaintiff needs for the maximization of its profits.

Until recently, the Army Corps of Engineers had a complete monopoly on all major dredging projects in the United States. The Rivers and Harbors Improvements Act of 1978, amending 33 U.S.C. §§ 622 and 624, directed the Corps to withdraw its fleet *pro tanto* with the entry of a privately owned fleet capable of performing the large quantity of dredging work available (33 U.S.C. § 622(b)). Hence, the BameriLease dredger will be capturing business, not from plaintiff, but from the Army Engineers, which is precisely the intendment of that statute.

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[18] Similarly, these circumstances render plaintiff's claims nonjusticiable. *See Poe v. Ullman*, 367 U.S. 497, 528 (1961) (Harlan, J., dissenting) ("some further procedure, some further contingency of application or interpretation, whether judicial, administrative or executive, . . . serve[s] to make remote the issue which [is] sought to be presented to the Court"). At this point in the BameriLease project, the only judicial opinion possible would be "an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). But a hypothetical or conjectural threat is not enough, *O'Shea v. Littleton, supra*, 414 U.S. at 494, 496-97; the doctrine of ripeness requires that the threatened injury be "certainly impending". *E.g., Babbitt v. United Farm Workers Nat'l Union, supra*, 442 U.S. at 298.

Indeed, under Section 622(b), plaintiff can have all the dredging work its ships can handle, whether or not the BameriLease dredger enters the market; all plaintiff need do is persuade the Chief of Engineers that it can do the work at "reasonable prices and in a timely manner" (33 U.S.C. §622(a)).

5. Among the many other infirmities of plaintiff's Article III contentions is the fact that, if the BameriLease dredger were actually capable of taking from plaintiff any business it needed for the maximization of its profits, then that would occur irrespective of any injunction in this case.

The BameriLease dredger will be, as plaintiff agrees, the "most technologically advanced hopper dredge in America" (Pet. 3). It has been under construction for more than nine months, and many millions of dollars have already been committed to that construction (*see* 214a-15a). As a practical matter, it can be operated only in the United States, because it is uneconomical for a dredger built for $50 million in the United States to compete in foreign commerce with those built for a fraction of that cost in Korea, Hong Kong or any of the other principal foreign shipbuilding ports (211a-12a; *see, e.g., Seatrain, supra*, 444 U.S. at 574-76).

Realistically, therefore, no injunction issued in this case would prevent the completion of construction or the eventual operation of this dredger in the domestic coastwise trade. Either it would be sold for that purpose, or, far more likely, the sole basis of plaintiff's complaint—the alleged taint on National's citizenship—would be immediately removed, simply by dissolving National and getting some other institution to form a new special purpose corporation whose citizenship could not be challenged even by an imaginative litigant such as plaintiff. The outline of the transaction that Marad had previously approved would then be finally approved, and the transaction, if it is otherwise viable, would go forward. Plaintiff, by obtaining an injunction based on National's participation, would have gained nothing at all.

In short, plaintiff has not, and cannot, carry its burden of showing that the injunction it seeks will prevent (or redress) the injury it postulates. *See Simon v. Eastern Ky. Welfare Rights Org., supra*, 426 U.S. at 45; *Warth v. Seldin, supra*, 422 U.S. at 515; *City of Hartford v. Towns of Glastonbury, supra*, 561 F.2d at 1051.

B. Incontestability

1. That plaintiff lacks standing to contest Marad determinations under Title XI is no Congressional oversight but part of a well thought-out plan to attract private capital to the merchant marine. A second part of this plan is implemented in 46 U.S.C. § 1273(e), by which Congress *precluded* direct judicial review of commitments to guarantee and guarantees under the Title XI program. In recognition of its importance to the Title XI program, Congress successively amended this section until it removed all exceptions to its grant of incontestability. That section now reads:

> "Any guarantee, or commitment to guarantee, made by the Secretary of Commerce under this subchapter shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee, or commitment to guarantee, so made shall be incontestable." 46 U.S.C. § 1273(e).[19]

2. Plaintiff conceded below that this provision precludes judicial review of commitments to guarantee and guarantees, but claimed that it was inapplicable to Letters Commitment.

[19] The legislative history also demonstrates that Congress meant the "conclusive" and "incontestable" provisions to be as absolute as the English language could make them, in order to reassure investors and their counsel of the complete security of the Government commitment. *See, e.g., Hearings on H. R. 8637 Before the House Comm. on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. 19-22, 24, 67, 105, 111-14 (1954); H.R. Rep. No. 688, 92d Cong., 1st Sess. 6, 9 (1971); S. Rep. No. 1137, 92d Cong., 2d Sess. 5, 8 (1972).

The statute itself, however, makes no such distinction. And Marad's regulations state flatly that a Letter Commitment embodies "the Secretary's commitment to execute Guarantees" (46 C.F.R. § 298.2(k)). Consistently, the Letter Commitment itself provides that it can be "terminated" by the Secretary if not "accepted" by the parties within thirty days (135a). If the commitment embodied by the Letter Commitment were not a binding, enforceable obligation within its terms (and within the normal meaning of the word "commitment" used in Section 1273(e)), there obviously would have been no reason to have provided for its "termination".

3. Plaintiff asserted below, without benefit of supporting authority, that the incontestability feature was intended *exclusively* for the benefit of subsequent purchasers of bonds.

The contention is self-evidently wrong. If it were true, there would have been no reason whatever for making commitments incontestable as well as guarantees; for only the parties to the initial financing transaction have any interest in the incontestability of commitments to guarantee; bondholders are interested solely in the incontestability of the guarantee itself.

4. Finally, if the industry could not so rely upon the Letter Commitment as an incontestable commitment to guarantee,[20] there would be little or no private investment in the merchant marine. Title XI would fail of its purpose.

Bankers will not commit funds to a project at interest rates low enough to ensure its economic viability unless and until they know those funds to be secure because the Government has committed itself to guarantee them (*see* 207a). Further, many of the terms of agreements among private parties to financings cannot even be specified prior to the Government commitment because that com-

[20] Marad purposely encourages that reliance. 242-43a; *see* Cook, *Government Assistance in Financing Title XI Guarantees*, 47 TUL. L. REV. 653, 672, 677-78 (1973) (authored by the former General Counsel of Marad).

mitment *sets* those terms (241a). And the commitment which sets those terms cannot be the printed commitment, for that document is issued only after all the private documentation of the project has been agreed upon (240-41a).

In sum, the Letter Commitment is the linchpin of the Title XI program. It embodies the fruit of Marad's investigations of a project and negotiations with the applicant (235a-40a); and it furnishes the private parties a focus for negotiation and the security to justify investment of the time and money necessary to conclude their negotiations (*see* 242a-43a).

C. Lack of Any Genuine Issue of Fact Regarding the Rationality or Legality of the Marad Commitment

1. Plaintiff's attempt to show that Marad acted illegally or capriciously in issuing the Letter Commitment (*see* 5 U.S.C. § 706) rests, not on any showing of "specific facts" as required by FED. R. CIV. P. 56, but on studious and obvious misconceptions.

Briefly, the core of plaintiff's complaint is that RBKW controls National, the bareboat charterer, impermissibly tainting National's U.S. citizenship under Marad regulations (*see* 46 C.F.R. § 298.10(a)). But plaintiff has offered no shred of evidence to show either that RBKW is National's "undisclosed principal" or that Marad will permit RBKW (through Stuyvesant) to arrogate to itself the powers of bareboat charterer; and for RBKW to assume either of those roles would be for it to assume a $50 million liability on its balance sheet in return for nothing at all.

On the one hand, it must be recalled that the Marad commitment is conditioned on the fact that National will delegate the entirety of the operation of the vessel to Williams-McWilliams (127a-28a, 233a-34a, 247a-48a). National, therefore, will have nothing to do with the operation and will make no profit on this venture; its parent is simply to be paid a small administrative fee (by Williams-McWilliams) (161a, 166a, 201a, 203a). RBKW

and Stuyvesant are excluded from operating the vessel; and they are excluded from ownership (233a, 247a-48a). They can achieve neither of those two roles, nor anything whatever, by putting National under their control.

On the other hand, both RBKW and Williams-McWilliams have gone to great lengths to minimize the possibility that the $50 million bareboat charter hire would have to be shown on their books. To avoid that result, RBKW (through Stuyvesant) obtained an option to cancel the time charter at will (159a-60a) and Williams-McWilliams refused to accept the status of bareboat charterer (160a, 210a) (although it accepted the powers, duties and compensation of the bareboat charterer, 210a-11a). It is simply not credible that RBKW would risk losing the balance sheet protection it gains from its option to cancel the time charter, hard-won at the negotiating table, by participating in a side deal with USCC for control of National.

2. The undisputed fact is that National was formed in the interests and at the instance of the transacting parties, so as to enable the transaction to go forward—since no party wanted to reflect a $50 million liability on its balance sheet. This is a perfectly standard commercial use of a special purpose corporation (*see* 199a-201a), and the only reason for the formation of this one (160a-61a, 200a-01a; *see* 210a).

Thus, the question is, not who asked USCC to create National, but whether RBKW has made some secret, utterly worthless and palpably self-defeating side deal. If plaintiff's unsubstantiated surmise on this subject could be credited to defeat this motion, then any plaintiff could defeat any summary judgment motion by saying anything at all.

Rule 56 is not so impoverished. *E.g., First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289 & n.19 (1968); *Mosher v. Saalfeld*, 589 F.2d 438, 442 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979); *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978).

CONCLUSION

For the foregoing reasons, plaintiff's petition for a writ of certiorari should be denied.

October 6, 1980

Respectfully submitted,

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APPENDIX

APPENDIX "A"

SUBCHAPTER D—VESSEL FINANCING ASSISTANCE

Part 298—OBLIGATION GUARANTEES

§ 298.1 Purpose.

This Part prescribes regulations implementing the provisions of Title XI of the Merchant Marine Act, 1936, as amended by P.L. 92-507 (46 U.S.C. 1271-1279), governing Federal ship financing assistance.

§ 298.2 Definitions.

For the purpose of this part—

(a) "Act" means the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101-1294).

* * *

(d) "Closing" means a meeting of various participants or their representatives in a Title XI financing, at which a commitment to issue Guarantees is executed, or at which all or part of the Obligations are authenticated and issued and the proceeds are made available for a purpose set forth in section 1104(a) of the Act, or at which a Vessel is delivered and a Preferred Mortgage is executed as security to the Secretary.

* * *

(g) "Documentation" means all or part of the agreements relating to an entire Title XI financing which must be furnished to the Secretary, irrespective of whether the Secretary is a party to each agreement.

(h) "Guarantee" means the contractual commitment of the United States of America, represented by the Secretary, endorsed on each Obligation, to make payment to the Obligee or an agent, upon demand, of the unpaid interest on, and the unpaid balance of the principal of such Obligation, including interest accruing between the

date of default (described in § 298.40 of this Part) and the date of payment.

* * *

(k) "Letter Commitment" means a letter from the Secretary to an applicant for Guarantees, setting forth specific determinations made by the Secretary with respect to the applicant's proposed project, as required by the Act and regulations of this part, and stating the Secretary's commitment to execute Guarantees, subject to compliance by the applicant with any conditions specified therein.

(l) "Maritime Administration" means that agency created within the Department of Commerce by Reorganization Plan No. 21 of 1950 (64 Stat. 1273), amended by Reorganization Plan No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91-469 (84 Stat. 1036).

* * *

(t) "Secretary" means the Secretary of Commerce, acting by and through the Assistant Secretary of Commerce for Maritime Affairs, the Maritime Administrator or any official of the Maritime Administration to whom is duly delegated the authority, from time to time, to perform the functions of the Secretary of Commerce or the Assistant Secretary of Commerce for Maritime Affairs.

* * *

(w) "Vessel" means all types of vessels, whether in existence or under construction, including passenger, cargo and combination passenger-cargo carrying vessels, tankers, towboats, barges and dredges which are or will be documented under the laws of the United States, floating drydocks which have a capacity of at least thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treat-

ment, abatement or control vessels, which are owned by citizens of the United States.

§ 298.10 Citizenship.

(a) *Applicability.* Prior to acquiring a legal or beneficial interest in a Vessel financed under Title XI of the Act, the applicant and any other Person, (including, but not limited to settlors, owner trustees, owner participants, bareboat charterers and such charterers other than bareboat charterers whose charter exceeds the blanket approval period provided for in Part 221 of this Title 46), shall establish its United States citizenship, within the meaning of section 2 of the Shipping Act, 1916, (1916 Act), as amended, (46 U.S.C. 801-852), sections 37 and 38 of the Merchant Marine Act, 1920, as amended, (46 U.S.C. 861-889), and, as applicable, section 905(c) of the Act, unless the Secretary approves a non-citizen participation under the authority of sections 9 and 41 and Section 37, as applicable, of the 1916 Act. The Secretary will not approve an application providing for ownership of such Vessel by, or bareboat chartering of such Vessel to, a non-U.S. citizen. See also Part 221 of this Title 46 concerning the documentation, transfer or charter of vessels to non-U.S. citizens. Citizenship may also be required of any Person who does not have a legal or beneficial ownership in the Vessel if such Person is the operator or has authority to direct the operation of the Vessel on behalf of the Shipowner.

(b) *Prior to Letter Commitment.* The applicant and any Person identified in paragraph (a) of this section, who is required to establish United States citizenship shall, prior to the issuance of the Letter Commitment, establish United States citizenship in form and manner prescribed in 46 CFR Part 355.

(c) *After Letter Commitment.* Any Person who has become identified with the project, for a reason indicated in paragraph (a) of this section, and who has not previously established United States citizenship within the

prior twelve calendar months, promptly shall establish its United States citizenship in the form and manner prescribed in 46 CFR Part 355.

(d) *Supplemental proof.* Unless otherwise waived by the Secretary for good cause, at least 10 days prior to every Closing, all Persons identified with the project who have previously established United States citizenship in accordance with paragraphs (a) and (c) of this section shall submit pro forma Supplemental Affidavits of Citizenship which have previously been approved as to form and substance by the Secretary, and on the date of such Closing such Persons shall submit to the Secretary three executed copies of such Supplemental Affidavits of Citizenship evidencing the continuing United States citizenship of such Persons bearing the date of such Closing.

§ 298.11 Vessel requirements.

Each Vessel to be constructed, reconstructed or reconditioned and financed by issuance of Guarantees shall meet the following criteria:

(a) *United States construction.* The Vessel shall be constructed, reconstructed or reconditioned entirely in a shipyard or shipyards of the United States, within the meaning of section 505 of the Act, and, where practicable, only from articles, materials and supplies of the growth, production or manufacture of the United States, as defined in section 1401(h) of the Tariff Act of 1930 (10 U.S.C. 1401(h)). If an applicant for Guarantees elects to use foreign-source materials or components in the Vessel, the cost thereof shall not be included in the Actual Cost of the Vessel used as the basis for determining the amount of Guarantees, as set forth in § 298.21, except if the Secretary shall approve an application for waiver upon determining that:

(1) The article, material or supply is not customarily grown, produced or manufactured in the United States; or

(2) With respect to other than major components of the hull or superstructure, and any material used in the construction thereof, compliance with the United States origin requirement of this section would unreasonably delay completion of a Vessel beyond its contract delivery date, provided that the applicant submits evidence satisfactory to the Secretary that due diligence was employed to obtain materials of United States origin.

* * *

(c) *Class, condition and operation.* The Vessel shall be constructed, maintained and operated so as to meet the highest classification, certification, rating and inspection standards for vessels of the same age and type imposed by the American Bureau of Shipping (ABS), or such other standards as may be approved by the Secretary, and comply with all applicable laws, rules and regulations as to condition and operation, including, but not limited to, those administered by the United States Coast Guard, Environmental Protection Agency, Federal Communications Commission, Public Health Service, or their respective successors, and all applicable treaties and conventions to which the United States is signatory, including, but not limited to the International Convention for Safety of Life at Sea. All Vessels carrying passengers or freight shall be deemed to be carrying such passengers or freight for hire, and shall be inspected and certificated in accordance with the applicable United States Coast Guard regulations, if any, at the earlier of the delivery of such Vessel or Vessels and the initial Closing.

* * *

§ 298.12 Operator's qualifications.

No Letter Commitment shall be issued by the Secretary without a prior determination that the applicant, bareboat charterer, or other Person identified in the

application as the operator of the Vessel, possesses the necessary experience, ability and other qualifications to properly operate and maintain the Vessel or Vessels which serve as security for the Guarantees, and otherwise to comply with all requirements of this part.

§ 298.14 Economic soundness.

No Letter Commitment for Guarantees shall be given by the Secretary without finding that the proposed project, with respect to which the Vessel or Vessels are to be financed under Title XI, will be economically sound. In making the economic soundness finding, the Secretary shall consider, together with other factors, the market potential for the employment of the Vessel or Vessels over the life of the Guarantees, projected revenues and expenses of the operation, the length of the Guarantee period and any charters, contracts of affreightment, transportation agreements or similar agreements which will assure the employment of the Vessel or Vessels.

§ 298.32 Required provisions in Documentation.

* * *

(b) *Assignments and general covenants from Obligor to Secretary.* The Obligor shall assign rights and shall covenant with the Secretary, as required by the Secretary, including, but not limited to, the following:

* * *

(4) Covenants relating to the annual filing of satisfactory evidence of continuing United States citizenship, in accordance with 46 CFR 355; warranty of Vessel title free from all liens other than those specifically excepted; maintaining United States registry of the Vessel; compliance with the provisions of the Ship Mortgage Act of 1920; Notice of Mortgage, payment of all taxes (except if being contested in good faith); annual financial statements audited by independent certified or independent licensed public accountants;

* * *

§ 298.43 Applicability of the Regulations.

The regulations in this part shall be in effect as to all applications for commitments for Guarantees, commitments to guarantee Obligations and Guarantees of Obligations made, issued or entered into after the effective date hereof pursuant to section 1104(a) of the Act, and all mortgages and loans covered thereby. These regulations supersede those issued under Part 298 of this title (23 F.R. 384) as of the effective date hereof, but shall not affect any commitment for Guarantees, Guarantees or contracts of insurance in existence on the effective date of these regulations. The regulations in this part may be amended, but said amendments shall have no effect upon any existing Guarantees, insurance contracts, commitment for Guarantees or Documentation.